

*Arizona Supreme Court
Judicial Ethics Advisory Committee*

ADVISORY OPINION 03-01
(January 8, 2003)

**Retired Judge Available for Assignment
Serving as an Expert Witness**

Issue

May a retired judge available for assignment under Section B of the Application provisions of the Code of Judicial Conduct serve as a paid, professional witness in a civil case while subject to call at any time as a pro tem judge in the superior court?

Answer: Yes, with qualifications.

Facts

A retired superior court judge serves as a pro tem judge in several different counties around the state. He accepts appointments from various courts as a retired judge available for assignment under Section B of the Application provisions of the Code of Judicial Conduct. The judge wants to know if he can be hired as an expert witness in a civil case, render a written opinion on whether one side has abused the civil process, and testify before a jury on that issue while available for assignment as a pro tem judge under Section B.

Discussion

Pursuant to Section B of the Application provisions of the Code of Judicial Conduct, a retired judge available for assignment to judicial service “is not required to comply with §§ 4C(2), 4D(2), 4D(3), 4E, 4F, 4G, 4H and 4I” of the Code of Judicial Conduct during such service. Canon 4G prohibits a full-time judge from practicing law. However, a retired judge available for assignment is not subject to this prohibition in Arizona. Therefore, a retired judge available for assignment may practice law and may be paid for his or her services. Under these circumstances, a retired judge could be hired to represent a party in an abuse of process case and be paid for the judge’s knowledge and expertise while acting as an advocate. Likewise, since a practicing attorney may appear as and be compensated for testifying as an expert witness, a retired judge may also use his or her knowledge and expertise as a witness, as well as appearing as an advocate.

Although, as a general matter, a retired judge available for assignment may serve as a paid, professional witness, we do believe that there are some restrictions that must be placed on such service. In this regard, we turn to Section D of the Application Section of the Code of Judicial Conduct pertaining to Pro Tempore Part-time Judges. Subsections (3) and (4) of Section D provide:

(3) A pro tempore part-time judge who serves once or only sporadically in a specialized division of a court or in a court without specialized divisions may appear as a lawyer in such specialized division or court during such service.

Advisory Opinion 03-01

(4) A pro tempore part-time judge who serves repeatedly on a continuing scheduled basis in a specialized division of a court or in a court without specialized divisions shall not appear as a lawyer in such specialized division or court during such service.

We believe that the same restrictions should apply to a retired judge available for assignment. Therefore, if a retired judge available for assignment would be prohibited by subsection (4) from appearing as a lawyer in a particular court, he or she should also be prohibited from appearing as a paid, professional witness in that court during such service.

Applicable Code Sections

Arizona Code of Judicial Conduct, Canon 4G and Application, Sections B and D (1993).